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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

COSMETIC WARRIORS LIMITED, believed to be a United Kingdom limited company doing business as LUSH HANDMADE COSMETICS,

Plaintiff,

vs.

LUSH VAPOR LLC, a California limited liability company, and TRANG DIEM TRAN, an individual

Defendants

Case No. 8:17-cv-00763

COMPLAINT AND DEMAND FOR JURY TRIAL

Complaint Filed: April 28, 2017
Trial Date: None Set

Plaintiff Cosmetic Warriors Limited ("CWL" or "Plaintiff") for its complaint against Defendants Lush Vapor LLC ("Lush Vapor") and Trang Diem Tran ("Tran") (together, "Defendants") and alleges as follows based on present knowledge, information, and belief:

I. PARTIES

1. Plaintiff Cosmetic Warriors Limited is a corporation organized and existing under the laws of the United Kingdom, with its principal place of business at 29 High Street, Poole, Dorset BH15 1AB in the United Kingdom. Plaintiff has extensive operations in the United States, including several retail shops in California and in this judicial district, and websites at www.lush.com and www.lushusa.com.

2. Upon information and belief, Defendant Lush Vapor LLC is a limited liability company formed in the State of California, on or about November 22, 2013 under and operating a business known as Lush Vapor, within this district at 14025 Crenshaw Blvd., #5, Hawthorne, California 92050.

3. Upon information and belief, Defendant Trang Diem Tran is an individual with an address of 14025 Crenshaw Blvd., #5, Hawthorne, California 92050.

4. Upon information and belief, Tran is the CEO, manager and/or owner of Lush Vapor. Upon information and belief, Ms. Tran directs and controls all activities of Lush Vapor, and Lush Vapor acts and serves as her alter ego and vice versa.

II. NATURE OF ACTION & JURISDICTION

5. This is an action for trademark infringement and unfair competition brought pursuant to Sections 32(1) and 43(a) of the Lanham Act, 15 U.S.C. §§ 1114(1) and 1125(a).

6. This Court has jurisdiction over this action under Section 39 of the Lanham Act, 15 U.S.C. § 1121, and Title 28 of the United States Code, §§ 1331 and 1338. This Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1332

because the matter in controversy in this action exceeds the sum or value of $75,000, exclusive of interest and costs, and is between a citizen of the United Kingdom and citizens of the State of California.

7. This Court has personal jurisdiction over Defendants because *inter alia* Defendants are domiciled in this judicial district, Defendants do business in this judicial district, and the conduct of Defendants complained of in this Complaint occurred in this judicial district.

8. Venue is proper in this district under 28 U.S.C. § 1391.

III. FACTS

A. CWL and Its Marks

9. CWL is one of the world's premier suppliers of bath, hair care, and beauty products made from natural, wholesome ingredients and related products. CWL's products are sold from over one hundred eighty LUSH branded retail stores operated in the United States, with dozens of stores in the State of California, including shops in Torrance, Walnut Creek, San Diego, Canoga Park, Newport, Anaheim, and other locations. CWL also sells its products and provides its services from its retail shops in many foreign countries, as well as via its catalogs and internet websites. CWL has a reputation of providing competitively priced, high quality bath, hair care, and beauty products and services, as well as related products such as clothing and knot-wraps. Over the last two decades, CWL's business in the United States has grown substantially and CWL is one of the nation's best known retail providers of bath, hair care, and beauty products and services.

10. CWL has been commercially using the LUSH and LUSH FRESH HANDMADE COSMETICS marks in the United States since at least as early as 1996 through mail order, telephone, internet and catalog sales throughout this country and has used the marks from its own retail locations in the United States since at least 2002, when its first United States retail shop opened in San Francisco. CWL has used

its trademarks in connection with cosmetic preparations and affiliated products in the nature of skin creams and moisturizers, perfumes, bath preparations, hair products, and retail store services, including consultations and providing beauty recommendations to customers. CWL also operates two LUSH branded spas in the United States along with its retail stores in many of the major shopping malls, such as Fashion Square Mall in Scottsdale, Arizona and the Mall of America in Bloomington, Minnesota, just to name a few.

11. CWL owns, among others, the following United States Trademark Registrations:

MARK	REG. NO.	REG. DATE
LUSH	2,282,428	October 5, 1999
LUSH	2,853,483	June 15, 2004
LUSH	3,001,303	September 27, 2005
LUSH	3,008,685	October 25, 2005
LUSH FRESH HANDMADE COSMETICS and Design	3,102,767	June 13, 2006
LUSH	3,987,808	July 5, 2011
LUSH	4,118,438	March 27, 2012
LUSH TIMES	4,532,289	May 20, 2014

A copy of each of these registrations is attached as **Exhibits A – H**. Each of the above registrations is valid and subsisting, and constitutes prima facie evidence of CWL's ownership of the mark and its exclusive right to use the mark in commerce on the goods and services specified in the registration. Further, each of the registrations shown in Exhibits A – G is incontestable, which operates as conclusive evidence of CWL's ownership of the mark and its exclusive right to use the mark in commerce on the goods and services specified therein.

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12. CWL has given notice of its registered rights in its marks by using the ® symbol in connection with its registered trademarks.

13. CWL has naturally and systematically expanded both the geographic footprint for the distribution of its goods and services, and the growth and expansion of its product line since 1995. For instance, CWL has expanded use of its LUSH mark to candles, incense, magazines, tote bags, clothing, and other goods beyond cosmetics.

14. CWL has expended a substantial amount of money and effort in advertising and promoting its LUSH marks. CWL is among the most innovative and creative companies selling cosmetics, soaps, hair products, bath products, perfumes, and related products and services in the world today. Those products and services are frequently imitated.

15. CWL and its LUSH marks are well known and consumers have come to know, rely upon, and recognize the LUSH mark as identifying CWL's products, services, and retail stores. Indeed, LUSH has become the corporate persona and identify of CWL in the minds of consumers. As a result of CWL's substantial sales, promotional, advertising, publicity, and public relations activities, the LUSH mark has acquired substantial goodwill and is an extremely valuable commercial asset.

16. CWL's LUSH mark is inherently distinctive, serving to identify and indicate the source of CWL's products and services to the consuming public and to distinguish them from others.

17. CWL also has common law rights in the LUSH mark in California and throughout the United States.

18. Since its inception in the mid-1990s, CWL has had an express intent to use and expand its line of LUSH branded products and services. This specific intent to expand includes geographic expansion and development of new and additional products. By way of example, CWL has and continues to open stores in new cities and states, and CWL frequently introduces new products.

B. Defendants' Unlawful Conduct

19. Defendant Tran is the owner and CEO of Defendant Lush Vapor (collectively, "Defendants"). Starting in or around January 2013, Defendants began to produce e-liquid and related electronic cigarette devices under the LUSH and LUSH VAPOR marks.

20. On or around May 1, 2013, Defendant Tran filed a use-based application (Serial No. 85/920,771) for the mark LUSH VAPOR in connection with "[c]hemical flavorings in liquid form used to refill electronic cigarette cartridges" in International Class 30. In the application, Tran disclaimed the word "vapor." The application does not specify or limit the use of the mark to any particular channels of trade. A printout from the Trademark Status & Document Retrieval database showing the status of the pending application is attached as **Exhibit I**.

21. Electronic cigarettes offer users the ability to consume nicotine without having to combust tobacco leaves. Electronic cigarettes are designed to vaporize e-liquid, which usually contains nicotine and food flavoring suspended in propylene glycol and/or vegetable glycerin. The e-liquid is housed in a cartridge within the electronic cigarette and connected to both a battery and an atomizer. The liquid is heated and atomized into a vapor for users to inhale. Electronic cigarettes are sold as disposable units with pre-filled e-liquid, as reusable units designed to accept replacement e-liquid cartridges, or as units with integrated cartridges designed to be filled (and refilled) with separately purchased e-liquid. Defendants promote and sell products directed at each of these three embodiments.

22. Defendants advertise and sell their goods under both the LUSH and LUSH VAPOR marks. Though only the LUSH VAPOR mark is the subject of a pending application for registration, Defendants consistently emphasize the LUSH component of the mark, either by omitting the VAPOR component altogether on promotional materials or displaying the former in larger and more stylized typeface than the latter.

23. Defendants use the LUSH and LUSH VAPOR marks in print advertising displayed at retail stores that sell their goods. They also promote the LUSH VAPOR brand on social media. There, too, the LUSH component is the dominant feature of the mark, and Defendant Tran often refers to herself as "Queen Lush."

24. Defendants' products are sold online under the LUSH VAPOR mark at www.lushvaporusa.com. Defendants also sell their products to a wholesaler, who distributes them to smoke shops, head shops, gas stations, convenience stores, and mall kiosks for retail.

25. Defendants are aware of the vast and valuable goodwill and reputation represented and symbolized by CWL's LUSH mark. Defendants also are aware that CWL's consumers and potential consumers rely upon CWL's LUSH mark as distinguishing CWL's products and services from the products and services of others.

26. Defendants' use of the LUSH mark is without permission, consent, or authority from CWL, who has had priority of use of the LUSH mark since long before the March 2013 date of first use claimed in Defendant Tran's pending application for registration.

27. On or around February 12, 2014, CWL initiated an opposition proceeding against Defendant Tran in the United States Patent and Trademark Office's Trademark Trial and Appeal Board. That action was assigned Opp. No. 91214890 and is still pending.

28. Defendants' acts of infringement and unfair competition complained of herein have been deliberate, willful, intentional, and in bad faith, and, since at least as early as February 2014, undertaken with full knowledge of and in conscious disregard of Plaintiff's rights. In view of the egregious nature of Defendants' actions, this is an exceptional case as described in § 35(a) of the Lanham Act, 15 U.S.C. § 1117(a)

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C. Effect of Defendants' Conduct on the Consuming Public

29. Defendants' LUSH VAPOR mark is confusingly similar to Plaintiff's LUSH marks.

30. The parties' marks have an overall confusingly and deceptively similar appearance, sound, meaning, and commercial impressions. Plaintiff's primary mark is LUSH, which is the dominant component of Defendants' LUSH VAPOR mark.

31. The parties' respective goods and services are closely related and sufficiently similar to support a likelihood of confusion. For instance, many of Plaintiff's products contain ingredients found in Defendants' products. Plaintiff and Defendants both sell liquid products designed to be used with atomizers: Defendants' e-liquid is atomized for users to inhale and Plaintiff's fragrance liquids are likewise applied using an atomizer. Both Plaintiff and Defendants provide aromatic services using similar devices when consulting with potential customers about their liquid goods. Plaintiff and Defendants display and sell their respective liquid goods in remarkably similar packaging.

32. Beyond Plaintiff's liquid fragrances, many of its other products are also similar in nature to Defendants' goods. By way of example, Plaintiff and Defendants both adopt sub-brands and product names using sexual innuendo and double entendre. Many of Plaintiff's products, such as candles and incense, can be used in conjunction with or as complements to Defendants' e-liquid products. Likewise, users may enjoy one of Plaintiff's aromatic bath bombs while using Defendants' vapor products when trying to relax after a long day. Moreover, bath, body, and cosmetic products are likely to be sold in some of the same retail stores as e-liquid products. Indeed, convenience stores like Walgreens® and Duane Reade™ sell both beauty products and vapor products at many of their locations, which further bolsters the similarity of the parties' respective product offerings.

33. The parties promote and sell their respective products under LUSH and LUSH VAPOR marks in overlapping channels of trade. In addition to convenience stores, Defendants' LUSH VAPOR goods are sold in kiosks and retail outlets located in shopping malls, sometimes within direct line of sight of a LUSH branded retail shop. Defendants have adopted a URL address for its website

(www.lushvaporusa.com) that is strikingly similar to one of Plaintiff's websites (www.lushusa.com). Many of the parties' social media accounts likewise share common elements.

34. Additionally, both Plaintiff and Defendants employ comparable messaging in their marketing materials. For instance, experiencing the scent of Plaintiff's liquid products is central to how CWL markets the LUSH brand to consumers. Different people will experience the same scent in different ways, and Plaintiff emphasizes these unique effects in its brand messaging. Defendants' employ a similar strategy by emphasizing the propensity for different people to uniquely experience its different e-liquid flavors. Further, both Plaintiff and Defendants' champion a commitment to using only fresh, premium quality ingredients in their respective products.

35. The purchasing conditions of both parties' products support a likelihood of confusion. Defendants' products are typically sold at retail from $7 to $19. Plaintiff's products have a median retail price range of between $10 and $30.

36. Plaintiff sells its LUSH branded products to all types of consumers – men, women, young, and old. The purchasing class for Defendants' goods are a subset of all consumers – namely, those eighteen years of age or older who smoke cigarettes or have otherwise used tobacco products.

37. Plaintiff is also aware of incidents of actual confusion as between the parties' respective LUSH brands. For instance, both Plaintiff and Defendants have received inquiries about an affiliation between the two.

38. Due to the highly similar nature of the parties' marks, the closely related nature of the goods and services provided under the marks, the overlapping trade channels through which the parties' respective marks and goods travel, and the known incidents of actual confusion to date, consumers are likely to believe that Defendants' goods originate from Plaintiff when the same is not true, resulting in a likelihood of confusion in the marketplace and damage to Plaintiff's goodwill.

39. Based on the co-use of the mark LUSH as well as the nature of and purchasing conditions for the respective goods and services, overlapping channels of trade, and known incidents of actual confusion to date, consumers are likely to mistakenly believe that Defendants' goods are offered by, affiliated with, and/or authorized by Plaintiff, resulting in a likelihood of confusion in the marketplace and damage to Plaintiff's goodwill.

40. Defendants' mark and conduct falsely suggest a connection, affiliation, or relationship with Plaintiff, resulting in a likelihood that consumers will be deceived or confused into believing Defendants' goods are an extension of Plaintiff's LUSH product lines, or are otherwise endorsed, sponsored, or approved by Plaintiff when the same is not true, resulting in marketplace confusion and damage to Plaintiff's goodwill.

41. The use and registration of the LUSH VAPOR mark for Defendants' goods is likely to cause confusion or to cause mistake or deception among consumers and potential consumers with Plaintiff's previously used LUSH marks, again resulting in damage to Plaintiff.

42. If Defendant Tran is granted registration of the mark subject to pending Application Ser. No. 85/920,771, it would thereby obtain at least a prima facie exclusive right to use the LUSH VAPOR mark. Such registration would be a source of further damage and injury to Plaintiff and could bar Plaintiff from attaining future registrations of its LUSH mark.

43. Registration of the LUSH VAPOR mark will result in damage to Plaintiff under the provisions of §§ 2(a), 2(d), and 43(a) of the Lanham Act, 15 U.S.C. §§ 1052 and 1125, pursuant to the allegations stated above.

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COUNT I

Federal Trademark Infringement

44. Plaintiff repeats and incorporates by reference each of the previous allegations as if fully set forth herein.

45. The acts of Defendants complained of herein are likely to cause confusion, mistake, or deception as to origin, sponsorship, or approval and thus constitute federal trademark infringement in violation of 15 U.S.C. § 1114(1). By reason of Defendants' bad faith and willful infringement, Plaintiff is entitled to recover actual damages, treble damages, an accounting of infringing profits, attorney fees, and the costs of this litigation pursuant to 15 U.S.C. § 1117 and injunctive relief pursuant to 15 U.S.C. § 1116.

COUNT II

Federal Unfair Competition

46. Plaintiff repeats and incorporates by reference each of the previous allegations as if fully set forth herein.

47. The acts of Defendants complained of herein constitute unfair competition in violation of 15 U.S.C. § 1125(a). By reason of Defendants' deliberate unfair competition, Plaintiff is entitled to recover actual and treble damages, attorney fees, and the costs of this litigation pursuant to 15 U.S.C. § 1117 and injunctive relief pursuant to 15 U.S.C. § 1116.

COUNT III

Rectification of Trademark Register

48. Plaintiff repeats and incorporates by reference each of the previous allegations as if fully set forth herein.

49. Defendant Tran's pending Application Ser. No. 85/920,771, if allowed to register, would injure Plaintiff by creating a barrier to Plaintiff obtaining other

registrations in the future and prevents the lawful expansion of the scope and range of goods and services Plaintiff may sell and provide under its LUSH mark. The registration would also diminish the value of Plaintiff's existing U.S. registrations covering its LUSH mark.

50. Under 15 U.S.C. § 1119, Plaintiff is entitled to an order from this Court instructing the United States Patent and Trademark Office to refuse registration of Defendant Tran's pending application for the LUSH VAPOR mark.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that:

A. This Court issue an order instructing the United States Patent and Trademark Office to refuse registration of pending U.S. Application Ser. No. 85/920,771;

B. Defendants, along with their officers, agents, servants, employees, attorneys and all those in active concert or participation with any of them, be permanently enjoined from using the LUSH or LUSH VAPOR marks and any other mark confusingly similar to Plaintiff's LUSH mark, or that rhyme with LUSH or are based on LUSH;

C. Defendants be ordered to transfer ownership to CWL of the domain name www.lushvaporusa.com, as well as any other domain name that incorporates the LUSH mark or any other mark that is confusingly similar to Plaintiff's LUSH mark;

D. Defendants, and all those persons in active concert or participation with them, be required to modify all packaging, marketing and promotional materials so as to eliminate use of the LUSH mark, and any other mark that is confusingly similar to Plaintiff's LUSH mark;

E. Defendants be ordered to file with this Court and to serve upon Plaintiff within 30 days after the entry and service of an injunction, a report in writing and

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under oath setting forth in detail the manner and form in which Defendants have complied with the injunction;

F. Plaintiff recover all damages it sustains as a result of Defendants' infringement and unfair competition, and that those damages be trebled;

G. This Court require Defendants to provide an accounting of their infringing profits resulting from the unlawful activities complained of herein, and issue an order that such profits be paid over to Plaintiff, increased by an amount this Court finds to be just under the circumstances of the case;

H. This Court issue an order requiring Defendants to compensate Plaintiff for its reasonable attorney fees incurred in this action;

I. Defendants compensate Plaintiff for its costs incurred in this lawsuit, with interest;

J. Plaintiff recovers such other and further relief as this Court may deem just and appropriate.

Dated: April 28, 2017

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By: */s/ Deborah A. Gubernick*
Deborah A. Gubernick

Attorneys for Plaintiff Cosmetic Warriors Limited

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JURY DEMAND

Under Fed. R. Civ. P. 38(b), CWL hereby demands a trial by jury on all issues triable as of right by a jury.

Dated: April 28, 2017

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By: */s/ Deborah A. Gubernick*
Deborah A. Gubernick

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